MUVIRIMI FRANCIS MANGWENDEZA
versus
RAJESH KUMARA INDUKANT MODI
AND
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MABHIKWAJ
BULAWAYO 6 SEPTEMBER, 20 NOVEMBER 2018 AND 2 MAY 2019

Election Petition

M Ncube, N Sithole & K M Nxumalo for the petitioner
Ms C Mudenda for the 1st respondent

MABHIKWA J: The petitioner was one of two (2) MDC Alliance candidates who took part in the elections for Bulawayo South Constituency contesting to be a Member of Parliament.

The 1st respondent represented the Zimbabwe African National Union (Patriotic Front) ZANU (PF) party in the same election.

There were a total of 24 candidates vying for the Bulawayo South Parliamentary seat.

Aggrieved with the election outcome, the petitioner filed this petition in terms of section 167 of the Electoral Act [Chapter 2:13] as read with Part III of the Electoral (Applications, Appeals and petitions) Rules, 1995.

The petitioner had also cited and served the Zimbabwe Electoral Commission as second respondent in the petition. However, at the start of the petition hearing, the petitioner addressed the court and conceded to the point *in limine* raised by the then 2nd respondent that the citation of the Zimbabwe Electoral Commission as a party was improper and incompetent as this was contrary to the express provisions of Part XX III section 166 of the Electoral Act. Having so conceded, the petitioner sought to withdraw the matter against the 2nd respondent. The petitioner

also tendered and undertook to pay 2nd respondent's wasted costs and disbursements in the total sum of US$800-00.

Mr Kanengoni for the 2nd respondent confirmed and all the parties being in agreement the 2nd respondent and its counsel were excused from further proceedings.

The petitioner, as can be seen on the petition, and as can be seen from the above facts, had cited two (2) respondents only but copied the application to fourteen (14) other candidates who had been vying for the same parliamentary seat out of the 24. There was no explanation for this action but there was no objection or query from any other party in the proceedings. It was not shown to be irregular and the proceedings thus proceeded. The 14 other candidates in any case neither filed any papers nor appeared for the hearing.

In effect, the petitioner sought an order setting aside 1st respondent's election as the duly elected member of the National Assembly and that the election was not conducted in accordance with the principles governing democratic elections as laid down in section 3 of the Electoral Act. The petitioner argued that the preliminary points raised relating to non-compliance with the provisions of the electoral act, were not the kind that would invalidate the whole petition. He argued for example that the law provides for the filing of a petition and Notice of petition within 14 days after the end of the election to which it relates and that in *casu*, though the two were not served on the same day, they were both served within the stipulated 10 days of the filing of the petition.

He argued also that on the point of failure to serve proof of security on 1st respondent, the argument by 1st respondent is not merited.

I find substance in the petitioner's submission that where there is substantial compliance, it has never been the intention of the legislature and indeed the courts to render the whole petition a nullity. From the cited cases, it appears to me also that it was not the intention of the legislature that failure to serve the respondent with security be fatal even where the petitioner has paid the full amount prescribed by the commission after consultation with the CHIEF JUSTICE, being payment of all costs, charges and expenses that may become payable by the petitioner. In *casu*, the petitioner managed to pay the full prescribed amount of US$2000 security costs within the stipulated period. All he did not do is to serve the same on the 1st respondent timeously with

absolutely no prejudice to 1st respondent hindering from acting in terms of section 170 of the Act as he would have done had the petitioner not paid the full security as stipulated.

The court thus finds that there was substantial compliance with the rules.

In *Muzenda* v *Kombayi and Another* HH 47/08 where the Honourable Judge had this to say:

> "My view is that once the petitioner pays the amount fixed, it is not necessary to furnish the names and addresses of securities ---. He only does so where he enters into a recognizance."

I find reason in the above finding and in the argument by counsel for the petitioner. Section 169 as read with 168 and 170 of the Act, contemplates a situation where a petitioner has not paid the whole amount of security, such that he or she has had to enter into recognissance with the registrar, whereupon he has to furnish the names and securities and their addresses. The proof of the amount paid, together with the full names and addresses of the sureties would have to be served on the respondent and any subpoenaed witnesses who, in terms of section 170 have the right to object to the amount paid.

I accordingly dismiss the points *in limine* and proceed to deal with the merits.

Brief Background facts

The petitioner complains in the main that in or about 3 July 2018 (27 days before the harmonized election), the Zimbabwe Electoral Commission published a notice titled

"National Assembly elections: WITHDRAWAL OF CANDIDATURE."

The Notice listed the names of people who had withdrawn their candidature contenting for the Bulawayo South Constituency National Assembly seat. The petitioner complained that his name was among the said list of 24 persons who had allegedly withdrawn their candidatures from the parliamentary elections when he infact had not so withdrawn and had not at all advised Zimbabwe Electoral Commission to that effect.

He further complained that the notice was false in respect of the petitioner and that the effect thereof was a lie whose intention was to decampaign him as those that supported him would think that he was no longer a contestant.

The petitioner complains further that in or about the end of July 2018, he discovered that there were ballot papers that did not have his name on them. A "functionary" of Zimbabwe Electoral Commission canceled ten (10) such ballot papers.

The court takes note that the entire complaint by the petitioner irregularities concerning the electoral process is against the Zimbabwe Electoral Commission and not the 1st respondent who is the now respondent alone. To that extent, the whole petition presents a somewhat "limping character" as against the 1st respondent.

However, the petitioner was quick to submit that in terms of section 167 of the Act and in the reasoning of the court *in Simbarashe* v *Zimbabwe Electoral Commission and another*. The irregularity complained of and committed by 2nd respondent, is sufficient to warrant the filling of the petition as the irregularity need not be committed by the 1st respondent per-se.

The court takes note that when the Zimbabwe Electoral Commission published the petitioner's alleged withdrawal from the election race, which publication the petitioner says was false and made without verification with him as to its correctness and which he describes as calculated to mislead his supporters, the petitioner had good reason to act and even file a challenge well before the election (27 days before the election). He did not act.

The court also is not persuaded to believe that both on 28 July and 29 July 2018, and having noticed what literally would be a continuation of the notice of 3 July 2018 and its effects, that is to say ballots papers without his name, he again did not act. He claims to have personally noticed the anomaly on 28 July 2018 and also noticed more ballot papers with the same anomaly on 29 July 2018.

In his founding affidavit at paragraph 7, the petitioner describes the "anomaly" as "an act of utter recklessness and malicious intent", and elsewhere as an "aberration". Yet he kept quite and did nothing banking on an alleged verbal promise by a Zimbabwe Electoral Commission official that such ballot papers would be cancelled.

The court is inclined to agree with the 1st respondent that the petitioner had all the time to act but did not because he and his election agents were satisfied that all was in accordance with the Law.

In fact sections 94 and 95 of the Act provides for Chief Election agents and Election agents. Section 94 provides that at least seven (7) days before polling day but before or after

nomination day, a candidate is expected to appoint a Chief Election agent, who inturn appoints an Election agent or agents and to immediately advise the commission in writing.

If on the revocation, withdrawal or death of his Chief Election agent, a candidate fails to notify the commission in terms of subsections 3 of section 94 and does not appoint another Chief Election agent, then the candidate shall be deemed to be his own Chief Election agent and be subject to the provisions of the Act as if he were both candidate and Chief Election agent. One Chief Election agent shall be present in each constituency.

In addition and in terms of section 93A, a candidate may appoint a Moving Political Party Election agent, who shall have all the powers and rights of a Chief Election agents except the power to appoint election agents in terms of section 95.

Section 95, provides that of the candidate's election agents, one shall be entitled to be present in each policing station in the constituency in which the candidate is standing for election. Section 95 (5) (b) provides that two (2) election agents shall be entitled to be present in the immediate vicinity of each polling station for the purposes of observing whether or not the electoral processes at the polling station concerned are conducted in accordance with the act, and either one of the two agents in the vicinity of the polling station may relieve the Chief Election agent.

In *casu*, a reading of the petition gives an impression that the petitioner did not have a chief election agent or poling agents. There is no mention of their role, observations or any complainants received or made by them on the alleged poling irregularities.

The petitioner claimed to have more than 50 supporters who told him that they failed to vote for him because ballot papers did not have his name when they were given to them to vote. He alleges further that although he has proof that ballot papers without his name were encountered in ten (10) polling stations, he believes that even on the remaining 6 polling stations the probabilities are that they are likely to have had ballot papers without his name. He even claims to have himself noticed the anomaly on 28 July 2018 and more ballots with the same anomaly on 29 July in both wards 21 and 6.

Surprisingly, the petitioner did not seek the opening of the ballot boxes for inspection and recount within 48 hours of the election in terms of section 67A of the electoral act.

Section 67A read as follows:

(1) "Within forty-eight hours after a constituency elections officer has declared a candidate to be duly elected in terms of section 66 (1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in one or more of the polling stations in the ward or constituency.
(2) A request in terms of subsection (1) shall—
(a) be in writing, signed by an appropriate representative of the political party or candidate making the request; and
(b) state specifically the number of votes believed to have been miscounted and, if possible, how the miscount may have occurred; and
(c) state how the results of the election have been affected by the alleged miscount.
(3) On receipt of a request in terms of subsection (1), the Commission shall—
(a) immediately notify all the other political parties and candidates that contested the election of the nature of the request and of the date and time of which it was received by the Commission; and
(b) order a recount of votes in the polling stations concerned if the Commission considers there are reasonable grounds for believing that the alleged miscount of votes occurred and that, if it did occur, it would have affected the result of the election."

The ballot boxes and ballot papers contained, and provided the primary source evidence that the petitioner now seeks to argue himself on the papers and by use of affidavits by alleged supporters. All the petitioner needed to do was to invoke the provisions of section 67A for the 2nd respondent and all concerned to physically ascertain of indeed there were ballot papers without his name. That is essentially the primary evidence that the petitioner needed. No explanation has been proffered as to why the petitioner failed to take that action and remedy considering the alleged history of the anomaly right from 3 July 2018, right up to 28 and 29 July and the polling day.

The 1st respondent has submitted that in terms of the V23B form for the said Constituency, three (3) MDC Chief Election agents signed the form as a true reflection of the election results for the Bulawayo South national Assembly. The court finds merit in 1st respondent's submission that the petitioner in his papers did not address the issue of inspection and verification by his election agents prior to the elections because he was aware that the issue of his name being on the ballot papers had been in order even on the election day.

In my view, that was precisely the reason also the petitioner avoided the invocation of section 67A of the Act.

In the same vein, the petitioner missed, or deliberately avoided the opportunity to show if true, that his election agents did not sign the V11 and V23B forms confirming their agreement with the results. The 1st respondent had polled 5752 votes whilst the petitioner polled 4155 votes.

Instead, the petitioner in *casu* sought to rely on affidavits of alleged supporters completely untested by cross-examination. Self-proclaimed supporters can hardly be relied upon by a serious impartial court as they are interested parties. I am not surprised therefore that in the Gokwe South Election, where the witnesses in fact verbally testified and the court believed some and disbelieved others, MAKARAU J (as she then was) still questioned the reliance on "seemingly directionless youths whose political loyalty can be briefly bought."

Also in *Hove* v *Gumbo* (Mberengwa West Election Appeal) S- 143-04. (2005 (2) ZLR 85) MALABA JA (as he then was), pointed out that it is very easy to find assistance of interested witnesses in an election petition. I would go on to add that it is even much easier to get interested witnesses or supporters who would depose to anything in an affidavit to be used in an election petition and misled the court if they are not tested by cross-examination for the truthfulness of their averments.

It is important to note that an election result, is not easily interfered with. In the recent case of *Nelson Chamisa* v *Emmerson Dambudzo Mnangagwa and 24 others* CCZ 42/18, MALABA CJ held that:

> "It is an internationally accepted principle of election disputes that an election is not set aside easily, merely on the basis that an irregularity occurred. There is a presumption of validity of an election.
> It is not for the court to decide elections, it is the people who do so. It is the duty of the court to strive, in the public interest, to sustain that which the people have expressed their will in."

The same was held in *Nath* v *Singh and others* [1954] SCR 892 at 895 where the court held that:

> "----. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the Law."

From the foregoing, it appears to me that the whole essence of an election petition is to prove to the court, to what extent the malpractice, or irregularity complained of, materially affected the outcome of the election. In *casu*, the petition does not meet that standard required by the Law.

The 1st respondent has prayed that the petition be dismissed with costs on the higher scale of legal practitioner and client (which are punitive costs) in his heads of argument. No cogent explanation has been given why he should be so punished. In any case in my view this is a case wherein the court would have no reason to punish the petitioner for exercising his right to challenge an election outcome.

Accordingly it is ordered as follows;

(1) That the petition is dismissed with costs on the ordinary scale.

(2) The election result for the National Assembly for Bulawayo South Constituency pronouncing 1st respondent as the duly declared winner, stands.

Ncube Attorneys, petitioner's legal practitioners
Mudenda Attorneys, 1st respondent's legal practitioners